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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JOHN A., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN A.,

Defendant and Appellant.

D060917

(Super. Ct. No. J227303)

APPEAL from a judgment of the Superior Court of San Diego County, Lawrence Kapiloff and Polly H. Shamoan, Judges. Affirmed in part and reversed in part.

The juvenile court (Hon. Lawrence Kapiloff) found true allegations in a Welfare and Institutions Code section 602 petition that John A. committed assault by means likely to produce great bodily injury (Pen. Code,¹ § 245, subd. (a)(1)); count 1) and attempted robbery (§§ 211, 664; count 2), and that both crimes were committed for the benefit of a

¹ All statutory references are to the Penal Code.

criminal street gang (§ 186.22, subd. (b)(1)). Judge Shamoon adjudged him a ward and ordered probation.

John contends there is insufficient evidence he aided and abetted the attempted robbery and the assault. We conclude there was sufficient evidence of assault but insufficient evidence of attempted robbery; therefore, we affirm in part and reverse in part.

FACTUAL BACKGROUND

Prosecution Case

On September 15, 2011, at approximately 9:30 p.m., Guillermo Lazzaro and his friend, Breanda Rodriguez, went outside his apartment to meet Rodriguez's cousin. Lazzaro noticed at least six males, excluding John, standing in front of an apartment directly across the street from his apartment. Some of these males made rude remarks to Rodriguez like, "Hey sexy. Why don't you come over here. Get with a real man." Lazzaro told them he did not want problems. The males replied, " 'F-you.' "

By this time, Rodriguez's cousin had arrived and Lazzaro walked to her car. The males approached Lazzaro. Rodriguez testified John was not in this group. One of the males reached for Lazzaro's pockets and asked what he had in them. Lazzaro pushed him away, but he hit Lazzaro in the face and knocked off his glasses, causing Lazzaro's vision to blur for about two minutes.

The other males began to hit Lazzaro, who stumbled to the ground and attempted to defend himself from the attack that lasted two to three minutes. Next, approximately ten individuals, including some who had been on the patio and inside of an apartment

across the street, surrounded Lazzaro, and he heard a female say, " 'Eastside.' " After the initial blur, Lazzaro saw six or seven individuals, including John, who was standing three to five feet away, behind another individual who was hitting Lazzaro. Lazzaro did not know if John physically participated in the assault.

Lazzaro's friends helped pull him inside the gated courtyard of his apartment complex. A fight ensued between Lazzaro's friends and the attackers. Between 10 and 15 people were throwing bricks and wood at Lazzaro's friends, but Lazzaro was unsure if John was among them. Lazzaro walked back outside the courtyard and was hit in the head by a Razor-style scooter, causing him to bleed heavily. Rodriguez telephoned police.

Several police officers responded to the scene, and Lazzaro's attackers ran away. San Diego Police Detective Steven Hobbs and San Diego Police Officer Kyle Markwald detained seven of them inside the courtyard of a nearby apartment complex. John, who was wearing a white T-shirt with orange or red stains on the front, was detained while running away with some of Lazzaro's attackers. At trial, Detective Hobbs did not know the source of the stain. Roberto D. was detained at the top of the stairs, and a "Razor-style" scooter was found nearby.

Police conducted a curbside lineup of three females and seven males approximately 10 to 15 minutes after arriving. Because Lazzaro told police that without his glasses he could not be confident about his identifications, they drove him close to the curb. Lazzaro managed to identify John and other individuals who he was confident were involved in the incident.

Of the nine arrested, all but John and one other were documented members of the Eastside gang. Lazzaro was not a member of a rival gang. Detective Hobbs testified as an expert that this was a gang-related incident because Lazzaro heard a female yell "Eastside," and all of his attackers were associated with the Eastside gang. Detective Hobbs stated the male who reached for Lazzaro's pocket conducted a "pocket check," which Eastside gang members carry out before robbing someone.

Defense Case

John testified that at the time of the incident he was on probation and had a 6:00 p.m. curfew. Nevertheless, around 9:30 that night, he reached an apartment near the crime scene. Approximately five to ten minutes later, John heard a commotion and saw a "scramble" about 30 to 40 feet behind him. Although it was dark, John saw a group trying to get Lazzaro inside a gate. Because John knew he had a curfew, he ran away when he heard that police were coming.

Juvenile Court's Findings

The juvenile court ruled, "Well, first of all, [John's] excuse for being there is pretty unbelievable. I don't believe he just dropped in to get his bike. He didn't walk a mile and a half just to go get his bike after curfew. He was with these guys all the time. [¶] Number two, he was there, and he was picked out as the person who was obviously aiding and abetting [Lazzaro's] beating. [John] had some red coloring on a white shirt of his that certainly is suspicious, and he had to be close enough to [Lazzaro] for him to see [John], and he was seen. I believe [Lazzaro]. He clearly identified [John]. He identified him that night. He identified him today. So [John's] caught. And the fact is [John] was

there and he ran off because the cops just happened to be so close that they were there within seconds, not minutes, seconds of when it occurred. . . . [¶] It was a vicious beating. And you're right, it was a violent felony."

DISCUSSION

I.

John contends the finding that he aided and abetted the attempted robbery is not supported by substantial evidence. "An attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission." (*People v. Medina* (2007) 41 Cal.4th 685, 694.) Specifically, John asserts that because his involvement was limited to appearing after the attempted robbery occurred, the evidence was insufficient to establish his knowledge and intent to commit robbery. We agree.

For a sufficiency of the evidence challenge, we determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) We review " 'the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Davis* (2009) 46 Cal.4th 539, 606.) "Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) This standard applies for

both direct and circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.) "The testimony of a single witness is sufficient to uphold a judgment." (*In re Sheila B.* (1993) 19 Cal.App.4th 187, 200.)

A conviction on an aiding and abetting theory requires "proof that an aider and abettor act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) "Factors to be considered by the trier of fact in determining 'whether one is an aider and abettor include presence at the scene of the crime, failure to take steps to attempt to prevent the commission of the crime, companionship, flight, and conduct before and after the crime.' " (*People v. Garcia* (2008) 168 Cal.App.4th 261, 273.) To be liable as an abettor, John must have instigated or advised the commission of the crime or have been present for the purpose of assisting in the crime's commission. (*People v. Durham* (1969) 70 Cal.2d 171, 181.) He " 'must share the criminal intent with which the crime was committed.' " (*Ibid.*) Mere presence at the scene of a crime is not sufficient to constitute aiding and abetting, nor is the failure to take action to prevent a crime. (*Ibid.*)

In *In re Juan G.* (2003) 112 Cal.App.4th 1 (*Juan G.*), the defendant stood next to the perpetrator who pulled a knife from his waistband, pointed it at the victim from about one foot away, and demanded money. (*Id.* at p. 3.) The victim felt threatened by the defendant, who stood close enough to touch him. (*Ibid.*) After the perpetrator took the victim's money, he and the defendant fled the scene. (*Id.* at p. 4.) The defendant claimed he did not know the perpetrator had a knife or was planning to rob the victim, and he ran

away with the perpetrator because he was drunk and not thinking clearly. (*Ibid.*) The juvenile court concluded there was sufficient evidence to support the finding that the defendant aided and abetted the robbery in light of his presence at the crime scene, companionship, and conduct before and after the offense which indicated he knew of and shared the perpetrator's criminal intent. (*Ibid.*)

Here, unlike in *Juan G.*, there is no evidence from which a reasonable trier of fact could infer that John shared the criminal intent for attempted robbery. Lazzaro's testimony shows a first group of males asked him what he had in his pockets and reached for them. Both Lazzaro and Rodriguez testified John was not among this group. Lazzaro only saw John about two minutes after he was hit. It is mere speculation to conclude John knew of the attempted robbery and intended to encourage or facilitate it. "By definition, 'substantial evidence' requires *evidence* and not mere speculation." (*People v. Cluff* (2001) 87 Cal.App.4th 991, 1002.) We reverse the juvenile court's true finding on that charge.

II.

John further contends there is insufficient evidence he aided and abetted the assault. Specifically, he asserts the true finding on that charge was erroneous because it was based on his mere presence during the assault and departure after it was complete. This time, we disagree.

Here, as in *Juan G.*, there was substantial evidence supporting the true finding that John aided and abetted the assault. By John's own admission, he was present outside the apartment during the assault. Lazzaro identified John as one of those who surrounded

him during the assault. "[W]hen the circumstances surrounding the identification and its weight are explored at length at trial, [and the] eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court." (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.) The juvenile court reasonably found Lazzaro's identification reliable. The juvenile court also reasonably inferred from the expert's testimony that John aided and abetted the assault by standing around Lazzaro while the assault took place, thus supporting those who were actually hitting Lazzaro. Further, John fled from the scene and was detained while trying to hide with others involved in the assault.

Despite John's claim that he was an innocent bystander, the juvenile court was under no obligation to believe he fled because he did not want to get in trouble for violating his curfew. (*Juan G., supra*, 112 Cal.App.4th at pp. 5-6.) Additionally, on appeal, " '[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' " (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

DISPOSITION

The conviction for the count two attempted robbery (Pen. Code, §§ 211, 664) is reversed. In all other respects the judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.